

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 719 of 2024

[Arising out of order dated 20.03.2024 passed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad, Division Bench, Court-1 in CP (IB) No.97/(AHM)/2022]

IN THE MATTER OF:

Shrenik Ashokbhai Morakhia

Having his residence at:

5, Kalyan Society, (Navjan Society),
Opp. Nagri Hospital,
Ellisbridge Mithakhali,
Ahmedabad - 380 006

...Appellant

Versus

1. Reliance Asset Reconstruction Company Ltd.

Having its address at:

11th Floor, North Side, R-Tech Park,
Western Express Highway, Goregaon East,
Mumbai - 400 063
Email id: rarc.info@relianceada.com;

2. Mahesh R. Sureka

Having his office at:

173, Udyog Bhavan Sonawala Road,
Goregaon East
Mumbai - 400063
Email id: mahesh@mrsureka.com

...Respondents

Present:

For Appellant: Mr. Pranit Bhattacharya and Mr. Raj Sarit Khare, Advocates.

For Respondents: Mr. Bharat Sood, Mr. P.S. Sudheer, Ms. Anne Mathew and Ms. Miranda Solaman, Advocates for R-1.

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J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal by a Personal Guarantor of the Corporate Debtor has been filed challenging the order dated 20.03.2024. passed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad Division Bench, Court No.1 by which Section 95 application filed by the Financial Creditor has been admitted. Brief facts of the case necessary to be noticed for deciding the appeal are:

- (i) Dena Bank has issued a Sanction Letter dated 18.06.2012 to the Corporate Debtor – M/s Morakhia Metals and Alloy Pvt. Ltd. The Corporate Debtor was granted credit facility to the extent of Rs.32.15 Crore.
- (ii) The Appellant along with one Mr. Pankaj Kumar Morakhia executed a Joint Deed of Guarantee dated 25.07.2012 in favour of the Dena Bank in order to secure the loan facility.
- (iii) On 31.05.2015, the account of the Corporate Debtor was declared NPA.
- (iv) On 04.03.2016, the Bank invoked Personal Guarantee dated 25.07.2012 and demanded the repayment of a sum of Rs.26.68 crore from the Appellant within 15 days.
- (v) On 29.01.2018, Appellant issued a Declaration-cum-Undertaking in favour of Dena Bank. Dena Bank assigned the

loan facility in favour of Respondent No.1 - Reliance Asset Reconstruction Company Ltd.

- (vi) On an application under Section 7 filed by the Financial Creditor, the Adjudicating Authority initiated CIRP against the Corporate Debtor by order dated 19.02.2020, in which proceeding Resolution Plan was also approved.
- (vii) The Financial Creditor issued Demand Notice dated 12.07.2021 in Form B under Rule 7(1) of the Insolvency and Bankruptcy (Application to the Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtor) Rules, 2019 claiming an amount of Rs.27,81,33,386 and thereafter on 10.08.2021, Section 95 application was filed by the Financial Creditor.
- (viii) On 19.04.2022, Resolution Professional was appointed, who submitted a report. The Appellant also filed its reply alleging that petition is barred by time. Rejoinder was also filed by the Financial Creditor.
- (ix) The Adjudicating Authority heard both the parties and vide order dated 20.03.2024 passed an order of admission under Section 100 of the Code. Aggrieved by which order this Appeal has been filed.

2. We have heard Shri Pranit Bhattacharya, learned counsel for the Appellant and Shri Bharat Sood, learned counsel appearing for Respondent No.1 – Financial Creditor.

3. Learned counsel for the Appellant challenging the order submits that date of default having occurred on 04.03.2016, the application under Section 95 having been filed on 10.08.2021 is beyond the period of three years and barred by time. The three years' period stood expired on 04.03.2019 and thereafter no application under Section 95 could have been filed by the Bank. It is further submitted that the Dena Bank having already invoked the guarantee dated 25.07.2012, it could not have assigned debt to Respondent No.1. Assignment Agreement itself is invalid. It is submitted that the application under Section 95 deserve to be rejected since it is signed by Resolution Professional who was a proposed Resolution Professional and not an authorized officer of Respondent No.1.

4. Learned counsel for the Respondent refuting the submissions of learned counsel for the Appellant submits that the application was not barred by time. Recall Notice was issued on 04.03.2016 and on 29.01.2018 Appellant issued a Declaration cum Undertaking which is clear acknowledgement of debt, hence, there will be further extension of limitation from 29.01.2018 and petition filed on 10.08.2021 could not be held to be barred by time. It is submitted that in view of order passed by Hon'ble Supreme Court in Suo Motu Writ Petition (Civil) No. 03 of 2020, the period from 15.03.2020 to 28.02.2022 was to be excluded and the application having been filed on 10.08.2021 i.e. during period which stood excluded by the Hon'ble Supreme Court, cannot be held to be barred by time. It is submitted that Section 95 application filed by the Financial Creditor was in accordance with the Rules and there was no defect in the

application. It is submitted that had the application been defective the Adjudicating Authority ought to have given opportunity to cure the defects. Since there was no defect in the application, hence, there was no shortcoming in the application.

5. We have heard learned counsel for the parties and perused the record.

6. The issue which has been raised by learned counsel for the Appellant is that application filed by the Financial Creditor was barred by time. Submission of the Appellant is that the Deed of Guarantee dated 25.07.2012 was invoked by Recall Notice dated 04.03.2016, hence, three years' period of limitation ended on 04.03.2019 and application filed by the Financial Creditor on 10.08.2021 was barred by time. Copy of the Invocation Notice dated 04.03.2016 has been brought on record as Annexure A-3, which clearly has been addressed to the Appellant and other Personal Guarantors. The notice demanded an amount of Rs.26.68 crore within 15 days from the date of notice. After issuance of notice, the Appellant has issued Declaration cum Undertaking, which has been brought record as Annexure A-4. The Declaration cum Undertaking dated 29.01.2018 is as follows:

“DECLARATION CUM UNDERTAKING

*I, Shrenik Morakhia S/o Shri. Ashok Manilal
Morakhia, presently residing at 289, SVP Road,
Khetwadi 4th lane, Shribhavan 5th floor, Mumbai-*

400004 do hereby solemnly affirm and state on oath as under:

1. *I say that I am a Director of M/s. Morakhia Copper & Alloys Pvt. Ltd. (formerly known as M/s. Morakhia Metal & Alloys Pvt Ltd.), and as well a guarantor for the debt outstanding of the said company towards M/s. Reliance Asset Reconstruction Company Ltd., which has become the assignment agreement executed by original lender Dena Bank in favour of Reliance Asset Reconstruction Company Ltd. for assignment of debts of the said company.*
2. *I say that, I am a member of Morakhia joint family which holds approximately 1.5 acres of land at Marol, Andheri (East), Mumbai, which has been given for development to M/s. Veer Jalaram Builders under a development agreement dated 21.07.2016 which duly registered at Sub registrar office under document no.7768/6513 on 21.07.2016 whereby the Morakhia Family jointly have to receive 45% of the constructed area by the developer which can be freely sold by them.*
3. *I say that being a member of the Morakhia family I have an undivided share in such property under development and would be entitled to a monetized portion of my share on realization by way of sale proceeds.*
4. *I say that being a guarantor for the facilities availed by Morakhia Copper & Alloys Pvt. Ltd.,*

I hereby create first charge / lien to the extent of my share in the said joint property and undertake to appropriate any proceeds from said property towards the outstanding of dues, if any of Morakhia Copper & Alloys Pvt. Ltd. or as per terms of settlement or mutual understanding in writing agreed with Reliance ARC from time to time.

5. *In case of default in said OTS, Reliance ARC may demand the share in the proceeds directly from M/s. Veer Jalaram Builders on my behalf for appropriation towards the dues of the said company.*

I solemnly affirm that this declaration is true to the best of my knowledge and belief and that it conceals nothing and that no part of it is false.”

7. When we look into the Declaration cum Undertaking, which was issued by the Appellant, it is clear that said declaration contained the acknowledgement of debt of the company towards the Financial Creditor. The acknowledgment of debt in writing is sufficient to extend the period of limitation as per Section 18 of the Limitation Act. We, thus are satisfied that the said Declaration cum Undertaking will extend further period of three years from date of undertaking and the application under Section 95 which was filed on 10.08.2021 cannot be said to be barred by time.

8. The Hon'ble Supreme Court by Suo Motu Writ Petition (Civil) No. 03 of 2020 has excluded the period from 15.03.2020 to 28.02.2022 and in the

present case the application was filed on 10.08.2021 i.e. during the aforesaid period. The three years' period from date of Declaration cum Undertaking came to an end on 28.01.2021 i.e. within the period which was excluded by the Hon'ble Supreme Court by order passed in Suo Motu Writ Petition (Civil) No. 03 of 2020. We, thus are satisfied that application cannot be said to be barred by time.

9. The next submission of the Appellant is that the insolvency petition which has been filed by the Financial Creditor has been signed by Resolution Professional who was not the authorized officer of Respondent No.1.

10. Section 95(1) permits a creditor to file an application through a Resolution Professional for initiating the insolvency resolution process. Thus, the submission of application by the Financial Creditor through Resolution Professional is clearly permitted by Section 95(1). We do not find any defect in the application which was filed by the Financial Creditor through Resolution Professional i.e. Mahesh R. Sureka, who is also submitted his written consent in Form A, which is part of the application. The authorized person of the Financial Creditor has authorized the Resolution Professional to sign the application in NCLT, Ahmedabad Bench on behalf of the Financial Creditor, which document has also been brought on the record along with the appeal. We, thus, do not find any defect in the application which warrants dismissal of application on this ground. No

defect was pointed out by the Adjudicating Authority to the Financial Creditor, which fact is undisputed.

11. In the Written Submission filed by the Appellant, one more submission is sought to be canvassed i.e. the Personal Guarantee dated 25.07.2012 executed by the Appellant in favour of Dena Bank is an unstamped document. The letter of guarantee and its execution is not subject matter of dispute. At no point of time the Appellant ever questioned the execution of Deed of Joint Guarantee in favour of the Bank. As noted above, the Appellant has acknowledged the debt by Declaration cum Undertaking dated 29.01.2018. Further, it is not shown that before the Adjudicating Authority any argument with regard to Deed of Guarantee being unstamped has been raised. The status of the Appellant as Personal Guarantor of the Corporate Debtor was never in question and we are of the view that on basis of this submission no fault can be found in the impugned order admitting Section 95 application.

12. The Appellant has submitted that the Assignment Agreement was not disclosed to the Appellant. The Application under Section 7 was filed by the Financial Creditor against the Corporate Debtor with regard to same loan facility, which was admitted by the Adjudicating Authority vide its order dated 19.02.2020. Thus, when Financial Creditor's status was accepted in Section 7 proceeding and the application under Section 7 was admitted against the Corporate Debtor, we are of the view that status of Financial Creditor as Assignee of the Bank cannot be questioned by the

Appellant in this proceeding. We do not find any substance in the submission of the Appellant.

13. Thus, we do not find any error in the order passed by the Adjudicating Authority admitting Section 95 application. There is no merit in the appeal. Appeal is dismissed.

**[Justice Ashok Bhushan]
Chairperson**

**[Arun Baroka]
Member (Technical)**

NEW DELHI

13th May, 2024

Archana